

June 15, 2023

The Honorable Tanya Chutkan
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 2528
Washington, DC 20001

Dear Judge Chutkan:

It is with great pleasure that I write in support of Bianca Herlitz-Ferguson's application for a clerkship with your court. Based on my interactions and collaboration with Bianca in the year that she worked at the Center for Children's Advocacy (CCA), and my understanding of the unique qualities and characteristics that best match a clerkship candidate, I wholeheartedly believe that Bianca is not only qualified for the clerkship but will be an incredible asset to your court.

I am the Deputy Director of CCA and an attorney who has worked for the past twenty-three years on issues involving children's health and child welfare in Connecticut. CCA is the largest non-profit legal organization in New England devoted exclusively to protecting and advocating on behalf of the legal rights of children. CCA is affiliated with the University of Connecticut School of Law (UConn) and provides holistic legal services for poor children in Connecticut communities through individual representation, education and training, and systemic advocacy. I also submit this recommendation on Bianca's behalf as an adjunct professor of law at the UConn School of Law where I have taught legal ethics and professional responsibility for over twenty years, and as a assistant clinical professor of medicine in the Department of Pediatrics, University of Connecticut School of Medicine.

Bianca began her tenure in our office in September 2021, shortly after her graduation from Yale Law School. She earned a prestigious Singer Connecticut Public Service Fellowship and chose our office to engage in work focusing on teen legal advocacy with issues revolving around homeless youth rights, child welfare and immigration advocacy. It quickly became apparent that Bianca was extraordinarily talented and lived up to her academic bona fides by not only providing incredibly powerful intellectual assessments of complex legal issues, but more importantly grasping and enveloping herself in the difficult and emotionally challenging world of representing vulnerable teenagers and youth, replete with legal and ethical real-world crises.

While I do not have direct experience in judging Bianca's academic performance, or her in-class experience during law school, I believe that I am qualified to opine on her day-to-day work as a first-year lawyer, and how the skills she demonstrated during her year at CCA will positively reflect as a judicial clerk.

First – Bianca's representation of vulnerable teenagers and youth as a Singer Fellow will enrich your court's discourse given her acute awareness of ethical dilemmas while representing populations at-risk and equally as important her willingness to seek assistance when these ethical dilemmas occurred. Representing vulnerable children and youth, especially in communities where legal exposure may result in detention or deportation (due to immigration status), is fraught with ethical pitfalls. As a long-time ethics professor and practitioner at CCA, I am typically the person whom most colleagues seek out when working on ethically complex issues. I can relay several instances where Bianca reached out not to merely seek my advice, but to engage in thoughtful dialogue about the need to do the "right thing" for clients – even though the Rules of Professional Conduct may have seemed counter-intuitive or even punitive. I particularly remember a case where her teenage client's "best interest" conflicted with that client's expressed wishes – and Bianca's keen sense of ethical awareness led her to agonize over how to best represent the client in accordance with her ethical obligations – all while managing to remain loyal to her client and assist the client in removing herself from a dangerously precarious situation.

Second – Bianca demonstrated exceptional lawyering skills during her fellowship, especially in the area of written work-product. This assessment does not imply that she lacks acuity and skill in verbal advocacy (hardly the case), but her written analysis stood out as equal to if not superior than any first-year lawyer with whom I've worked in my twenty-three years at CCA. In particular, I asked Bianca to collaborate with me on an amicus curiae matter, *In re Amias I*, a complicated child welfare appeal pending in the Connecticut Supreme Court. Bianca took the lead on researching and writing up complex legal analyses and conferencing with our amicus partner (a pro-bono law firm). I fondly remember her telling me that she was a "child welfare law geek" at heart during the course of our work together on this case. Her recognition of the subtleties and nuances of the issue on appeal (our particular concern) was immediately apparent and provided extraordinary guidance to our pro bono partner. My only regret in reviewing that episode was that I did not ask Bianca to write the brief, which had she done may have had more impact than the one which actually was submitted to the Court.

Finally, I believe that Bianca has the wherewithal and skills to become a leader in her field, which at this point in time is devoted to preserving and expanding the constitutional and civil rights of children and families. Bianca's present employer, Children's Rights, is a national leader in advocating for children and families, especially in the areas of child welfare, juvenile justice, unaccompanied minors and LGBTQ rights. While we were sorry to lose Bianca as a colleague, dedicated advocate and friend, we were thrilled that she moved on to an organization that is so deeply rooted in the areas of the law in which she excels and loves. I am confident that she will continue to make her presence felt in the core legal subjects where passion, dedication and skill matter most – advocating for underserved children and youth who strive for equity in all areas of daily life.

Finally, on a personal note, I believe that a clerkship is a perfect opportunity for a court/judge to mentor an extremely qualified and passionate lawyer who seeks to learn and grow as an intellectually gifted advocate. She is truly a pleasure to work with and I miss our interactions and discussions on complicated and ethically demanding cases. I am confident that she will be a great addition to your court and be a wonderful colleague to collaborate with during the term of a clerkship.

Jay Sicklick - JSicklick@cca-ct.org - 8607128822

Thank you for providing me with this opportunity to write a letter in support of Bianca's application. If you have any questions or would like additional information, please don't hesitate to contact me at jsicklick@cca-ct.org or on my cell at (860) 712-8822.

Sincerely,

/S/ Jay E. Sicklick

Jay E. Sicklick
Deputy Director
Director, Medical-Legal Partnership

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June 15, 2023

The Honorable Tanya Chutkan
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 2528
Washington, DC 20001

Dear Judge Chutkan:

I am delighted to offer my highest recommendation for Bianca Herlitz-Ferguson. She is among our best students academically, and she is thoughtful, insightful, and committed to using law to promote children's well-being. She would be an outstanding law clerk.

I first met Bianca when she worked for me as a research assistant in her first year of law school. Her assignment was to identify existing research on medical-legal partnerships and to classify the research by quality and subject matter. She did an outstanding job, producing a detailed memo of 20 single-spaced pages that served as a guide to the literature.

Bianca was also a student in two of my classes. In Child Development and the Law, she did outstanding work and earned an H. Her work in Federal Income Taxation was also extremely solid but, because of the grading curve, fell at the top of the P range.

As you can see from Bianca's resume, she has a long and deep history of working for children's welfare. In law school, she took every opportunity to deepen her legal knowledge and put it to practical use. To take just one relevant example, Bianca worked with Alice Rosenthal at the medical-legal partnership sited in the YNHH Children's Hospital. The medical-legal partnership handles a range of legal issues for children and their families, and I know from speaking with Alice that Bianca was outstanding as an intern.

My recitation of Bianca's accomplishments cannot quite capture how thoughtful, determined, and committed she is. She is at once a fierce lawyer and a quiet presence who inspires confidence. If I were hiring clerks, Bianca would be right at the top of all the Yale students I know.

Please call me at 203-415-9832 (cell) if I can tell you more about Bianca.

Very truly yours,
Anne L. Alstott
Jacquin D. Bierman Professor

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Bianca Herlitz-Ferguson

WRITING SAMPLE I

As a Summer Intern with the Department of Justice, Civil Rights Division, Special Litigation Section, I prepared a memorandum for the Juvenile Practice Group. This memorandum examined Eighth Circuit law regarding waiver of counsel and whether age is a relevant factor in determining the validity of such a waiver.

I have received permission from the Department of Justice to use this memorandum as a writing sample. To preserve confidentiality, I have removed any reference to specific jurisdictions or case-specific applications. The views and analysis expressed herein are entirely my own and do not reflect those of any other person or organization.

To: Supervising Attorneys
From: Bianca Herlitz-Ferguson
Date: June 12, 2020
Subject: Eighth Circuit Law on Waiver of Counsel

MEMORANDUM

I. Introduction

When their liberty is at stake, children facing delinquency charges are constitutionally entitled to the right to counsel. *In re Gault*, 387 U.S. 1, 28 (1967). The Supreme Court has recognized that children “need[] the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.” *Id.* at 36. Despite *Gault*’s promise and youths’ known vulnerabilities, state courts nationwide allow youth to waive their right to counsel without adequate protections. The vast majority of states allow children to waive their right to counsel without first consulting an attorney despite evidence that “far too many children do not understand the role of their lawyer, how defense attorneys are positioned to protect them, or the consequences of forgoing representation.”¹ This Memorandum discusses the Eighth Circuit’s approach to evaluating constitutionally sufficient waiver of counsel.

To be constitutionally sufficient, state trial courts must conduct a two-part inquiry to determine whether a waiver of counsel is valid. First, those courts must find that a defendant is competent and understands the proceedings. Second, the court must determine that their waiver of rights is knowing and voluntary. The particular characteristics of the defendant determine how probing the judge must be during a colloquy. Relevant factors include a defendant’s upbringing, education, mental health, familiarity with the criminal justice system, and age. While age is one

¹ NAT’L JUVENILE DEFENDER CTR., ACCESS DENIED: A NATIONAL SNAPSHOT OF STATES’ FAILURE TO PROTECT CHILDREN’S RIGHT TO COUNSEL 26 (2017).

factor in assessing the validity of waiver of constitutional rights, it is an essential factor to consider in the context of children given their comparative lack of education, inexperience with the justice system, and lesser ability to clearly consider the consequences of waiver.

II. Discussion

A. In the Eighth Circuit, courts must conduct a two-part inquiry to determine whether a waiver is valid.

In order to determine whether a waiver is valid, a trial court must engage in a two-part test to determine whether the defendant is both competent to waive counsel and whether the defendant in fact did waive counsel knowingly and voluntarily. *Shafer v. Bowersox*, 329 F.3d 637, 650 (8th Cir. 2003) (citing *Godinez v. Moran*, 509 U.S. 389, 400 (1993)). The right to counsel “invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel.” *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938). For that reason, the law imposes an affirmative obligation on trial courts to evaluate whether a constitutional right is validly waived: “[t]he protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.” *Johnson*, 304 U.S. at 465. Because counsel is “crucial to our adversarial system of justice,” trial courts must “indulge every reasonable presumption against the waiver.” *Wilkins v. Bowersox*, 145 F.3d 1006, 1011 (8th Cir. 1998) (quoting *Johnson*, 304 U.S. at 464).

In making such a determination, a court must consider “the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.” *Meyer v. Sargent*, 854 F.2d 1110, 1114 (8th Cir. 1988) (quoting *Edwards v. Arizona*, 451 U.S. 477, 482 (1981)). The nature of that inquiry varies based on the particular facts and circumstances of the case and the defendant. While some circumstances require “a specific on the record warning of the dangers and disadvantages of self-representation,” that is

“not an absolute necessity in every case for a valid waiver of counsel.” *Meyer*, 854 F.2d at 1115. Other circumstances may require less. *Id.* In each case, however, that inquiry must involve two questions. First, the court must ask whether the defendant is competent to waive their right to counsel. Second, the court must ask whether the defendant knowingly and voluntarily did so in this case. *See Godinez v. Moran*, 509 U.S. 398, 400 (1993). I address the specific requirements of each question in turn.

a. Competency

A finding of competency is a necessary but not sufficient component of knowing and voluntary waiver. A defendant may be found competent to waive the right to counsel but not otherwise be found to have done so knowingly and voluntarily. To determine whether a defendant is competent to waive counsel, the court must ask: does the defendant “have the ability to understand the proceedings?” *Shafer v. Bowersox*, 329 F.3d 637, 650 (8th Cir. 2003). The competency standard here is the same as that in the case of competency to stand trial. *Godinez v. Moran*, 509 U.S. 389, 391 (holding that the competency standard for pleading guilty or waiving counsel is the same as the competency standard for standing trial). Due process here does not require more than the *Dusky* standard for determining competency to stand trial. *Id.* at 402. In both cases, the court must determine whether the defendant has “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and whether he has “a rational as well as factual understanding of the proceedings against him?” *Id.* at 396 (citing *Dusky v. United States*, 362 U.S. 402, 402 (1960) (*per curiam*)). However, a finding of competency is only the starting point to determining a constitutionally valid waiver of counsel. The court must then go on to “satisfy itself that the waiver of . . . constitutional rights is knowing and voluntary.” *Id.* at 400.

b. Knowing and Voluntary Waiver

The Eighth Circuit holds that “[t]he ‘key inquiry’” in assessing the validity of “a Sixth Amendment waiver to determine whether it was knowingly and intelligently made” requires asking “whether the accused was ‘made sufficiently aware of his right to have counsel’ and ‘of the possible consequences of a decision to forgo the aid of counsel’ so that his choice is made with his eyes open.” *Meyer v. Sargent*, 854 F.2d 1110, 1114 (8th Cir. 1988) (quoting *Patterson v. Illinois*, 487 U.S. 285, 292-93 (1988)). That inquiry is pragmatic in its approach. *Id.* Two factors are particularly relevant to the court’s fact-intensive analysis. First, the court should investigate what role counsel plays at the relevant stage of the proceeding. *Id.* Second, and more specifically, the court should reflect on the particular assistance counsel could provide to the defendant at that stage. *Id.* Both factors “determine the scope of the Sixth Amendment right to counsel, and the type of warnings and procedures that should be required before a waiver of that right will be recognized.” *Id.* (quoting *Patterson*, 487 U.S. at 298).

B. Where the characteristics of the defendant are likely to compromise their decision-making ability, the Eighth Circuit suggests that a court’s colloquy must probe deeper to ensure that constitutional rights are validly waived.

The Eighth Circuit suggests that a trial court’s inquiry should be more demanding, where factors make it less likely that a defendant could make “knowing, voluntary, and intelligent decisions.” *Shafer v. Bowersox*, 329 F.3d 637, 649 (8th Cir. 2003). A thorough colloquy that more closely aligns with the Supreme Court’s plurality decision in *Von Moltke v. Gillies* may be constitutionally necessary where factors such as mental health history, upbringing, education, and young age compromise decision-making abilities. 332 U.S. 708 (1948). In *Von Moltke*, a plurality of the Supreme Court held that the right to counsel “imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent

waiver by the accused.” *Id.* at 723. That inquiry requires that a judge “investigate as long and as thoroughly as the circumstances of the case before him demand” *Id.* at 723-24. The factors to be considered include whether the defendant understands: the “nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. *Id.* at 724. *Wilkins v. Bowersox*, 145 F.3d 1006 (8th Cir. 1998) and *Shafer v. Bowersox*, 329 F.3d 637 (8th Cir. 2003) provide two instructive examples of when the Eighth Circuit may require a more demanding colloquy from a state trial court judge.

a. *Wilkins v. Bowersox*

In *Wilkins v. Bowersox*, the Eighth Circuit held that a state trial court’s colloquy was insufficient to protect the defendant’s constitutional rights when he waived his right to counsel and pled guilty. 145 F.3d 1006, 1012 (8th Cir. 1998). The defendant was sixteen years old when he confessed to robbery and murder. *Id.* at 1008. He was tried in adult court, waived his right to counsel, and pled guilty to both charges. He openly expressed that he wanted the death penalty for himself. The Eighth Circuit identified three fundamental problems with the trial court’s colloquy to determine whether Wilkins knowingly, intelligently, and voluntarily waived his right to counsel during the adjudicatory stage.

First, the Eighth Circuit held that the trial court’s colloquy was inadequately probing as to whether Wilkins knowingly, intelligently, and voluntarily waived his right to counsel. The trial judge’s colloquy “consisted predominantly of leading questions that failed to allow Wilkins to articulate his reasoning process.” *Id.* at 1012. Wilkins’s answers to these leading questions regarding his “intention to waive his right to counsel” consisted of “simple ‘yes’ and ‘no’ answers.” Such a pro forma inquiry “does not conclusively establish that his waiver of counsel

was valid.” *Id.* Judges have an “obligation to penetrate the surface with a more probing inquiry to determine if the waiver is made knowingly, intelligently, and voluntarily.” *Id.* (citing *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948)). That requires more than simply “*attempt[ing]* to explain all of the available options.” *Id.* The burden is on the judge to adequately inform and spell out the implications of the waiver in a way that the defendant can understand. The trial court in this case should have “explain[ed] to Wilkins his possible defenses to the charges against him” and “inform[ed] him of lesser included offenses or the full range of punishments that he might receive.” *Id.* The court did neither. The Eighth Circuit here suggests that a valid colloquy for such a defendant requires that the judge actually explain possible defenses to the charges brought as well as the scope of potential sentences. In addition, the judge should provide time and space for the defendant to explain his reasoning for seeking a waiver.

Second, the Eighth Circuit established that the trial judge in this case was required to tailor the colloquy to the defendant’s unique characteristics: “a defendant’s background and personal characteristics are highly relevant in determining the validity of such a waiver.” *Id.* The Eighth Circuit suggests that unique characteristics of the defendant include: age, education, upbringing, and mental health history. The lower court in this case “failed to adequately address and consider Wilkins’s background in determining the validity of his waiver of counsel.” *Id.* The judge acknowledged Wilkins’s age and limited education but failed to fully consider both his difficult upbringing, including severe abuse at the hands of relatives, and Wilkins’s demonstrated history of mental illness and substance abuse beginning at a young age. *Id.* at 1013. Those factors were particularly important because “Wilkins’ youth, troubled background, and substantial mental impairments clouded his decision-making throughout the state proceeding.” *Id.* at 1015. The Eighth Circuit thus held that “[g]iven the combination of Wilkins’ young age and the record

evidence of his severely troubled childhood, the state trial court's colloquy with Wilkins was far from the kind of in-depth inquiry that is necessary to ensure a valid waiver of counsel.” *Id.* at 1013.

Third, the Eighth Circuit held that the trial court erred in concluding that Wilkins’s waiver of right to counsel was valid simply because he was found competent to stand trial. *Id.* In order to “satisfy itself that the waiver of his constitutional rights is *knowing and voluntary*,” the “competency inquiry” as applied to the waiver of counsel goes further than just “the ability to understand the proceedings.” *Id.* (quoting *Godinez v. Moran*, 509 U.S. 398, 400). Competency for purposes of a valid waiver of rights focuses on “determining ‘whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced.’” *Id.* (quoting *Godinez*, 509 U.S. at 401). It is therefore legal error for a court to conclude that a defendant validly waived counsel on the grounds that they are competent to stand trial. Further, the Eighth Circuit rejected the state court’s conclusion that a trial court’s “opportunity to observe” the defendant and the defendant’s “use of standby counsel” are sufficient to uphold the validity of a waiver. Those factors “do not necessarily lead to the conclusion” that the defendant “voluntarily and intelligently waived counsel.” *Id.*

b. *Shafer v. Bowersox*

In *Shafer v. Bowersox*, Robert Shafer, upon waiving his right to counsel and his right to a jury trial, pled guilty to two counts of both first-degree murder and armed criminal action in Missouri state court and was sentenced to death. 329 F.3d 637, 637 (8th Cir. 2003). Like Wilkins, Shafer indicated a desire to be sentenced to death. *Id.* In this case, the state trial court “asked few questions . . . with respect to Shafer’s wavier of counsel for the guilt phase and did not fully inform him about his possible options or the choices he faced.” *Id.* at 647. The court “never probed beneath the surface of Shafer’s declaration that he wanted to waive his right.” *Id.*

at 648. Such a cursory inquiry was constitutionally insufficient as applied to this defendant for reasons similar to those elucidated in *Wilkins*.

As in *Wilkins*, the Eighth Circuit read *Von Moltke*'s "penetrating and comprehensive examination" to require further probing in *Shafer*. It is not enough for a court to advise a defendant like *Wilkins* or *Shafer* that "it would be to his advantage to have an attorney," and warn that "he would be giving up the right to attack the performance of his attorneys" by waiving his right to counsel. *Id.* Where a defendant's ability to make informed decisions is clearly compromised in some way, such remarks fail to adequately and satisfactorily "advise him of specific dangers or limitations related to self-representation." *Id.* In *Shafer*, the Eighth Circuit held that "[a] thorough colloquy was even more important" in *Shafer*'s case because his "mental condition" and diagnoses of "depression, personality disorders, and other psychological problems caused impulsive and irrational decision making and frequent mind changes." *Id.*

Both *Wilkins* and *Shafer* indicate that where the trial court is aware of factors and characteristics about a defendant that may compromise their decision-making ability, constitutional protections require the court to undertake a more demanding, thorough, and careful waiver of counsel in order to ensure that a more vulnerable defendant knowingly, intelligently, and voluntarily waived their constitutional rights.

C. Where individual circumstances suggest that a defendant is more capable of making decisions, the Eighth Circuit establishes that trial courts may engage in a less demanding waiver colloquy.

The Eighth Circuit does not require a rigorous and exacting waiver colloquy in all cases. Acknowledging that the Supreme Court's decision in *Von Moltke* was merely a plurality decision, the Eighth Circuit in *United States v. Kiderlen* qualified *Wilkins* and emphasized that "[n]either the Supreme Court nor this court . . . has adopted the *Von Moltke* plurality opinion in

all of its particulars.” 569 F.3d 358, 367 (8th Cir. 2009). As a result, *Wilkins* “is best understood as a case-specific application of the general principle that our assessment of a waiver depends ‘upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.’” *Id.* (quoting *Meyer v. Sargent*, 854 F.2d 1110, 1114 (8th Cir. 1988)). The Eighth Circuit thus “reject[ed] Kiderlen’s contention that a waiver of the right to counsel must exhibit all of the features discussed in *Wilkins* before it is deemed knowing and voluntary.” *Id.*

While *Kiderlen* involved a defendant facing federal charges in the Eastern District of Missouri, the particular characteristics of the defendant indicate why a less demanding colloquy may be constitutionally sufficient in some cases. Unlike the defendants in *Wilkins* and *Shafer*, several factors supported a finding that Steven Kiderlen was capable of knowingly and voluntarily waiving his right to counsel. First, Kiderlen not only graduated high school but also completed one year of college. Second, a psychological evaluation of Kiderlen demonstrated sophisticated thinking abilities. Third, Kiderlen had fifteen prior convictions that indicated significant familiarity with the criminal justice system. *Id.* at 366. Because of those factors, the colloquy was considered constitutionally sufficient where the court explained the charges as well as possible penalties he faced and to which Kiderlen “responded appropriately.” *Id.* Additionally, the judge “stress[ed] at some length the complex duties of counsel in a criminal trial and recommend[ed] that Kiderlen accept representation by a trained attorney.” *Id.*

Knowing and voluntary waiver of counsel does not require that the court make a determination that a defendant may adequately or successfully represent himself pro se. It merely requires that a defendant is “‘made sufficiently aware of his right to have counsel’ and ‘of the possible consequences of a decision to forego the aid of counsel.’” *Jones v. Norman*, 633 F.3d

661, 667 (8th Cir. 2011) (citing *Meyer*, 854 F.2d at 1114). This does not require a sophisticated level of knowledge or understanding of legal rules and procedures, for example. The “background, experiences, and conduct of the accused” informs the “amount of information a court needs to provide” and the “amount of inquiry the court is required to make to test the defendant’s understanding.” *Id.* at 667.

A judge conducting a colloquy also need not anticipate and spell out all disadvantages that a defendant may face as a result of waiving counsel and proceeding pro se. In *Overton v. Mathes*, the defendant challenged a trial court’s finding that he validly waived his right to counsel. 425 F.3d 518 (8th Cir. 2005). Specifically, he argued that he could not have knowingly and intelligently waived this right, because the state trial judge failed to inform him that he would have to wear leg restraints while he argued his own case. This omission, he argued, failed to adequately allow him to understand the “disadvantages of representing himself.” *Id.* at 521. In this case, there was evidence to suggest that the trial court judge did not know that Overton would be required to wear leg restraints. *Id.* at 520. Further, the record indicated Overton objected to wearing leg restraints before the trial began, which was sufficient indication that he understood the disadvantage he would face should he proceed pro se and with them. *Id.* The Eighth Circuit noted that it was satisfied that given this defendant’s prior courtroom experience and understanding of the law, the judge’s colloquy was constitutional as applied and the court was not required to ensure that a defendant understood that he would be particularly disadvantaged by a specific factor like wearing leg restraints during the trial. Again, this case supports the conclusion that the specific characteristics and experience of the defendant drive the nature of the court’s obligations in determining the validity of a waiver.

D. Based on Eighth Circuit precedent, trial courts should engage in a demanding inquiry before accepting a youth's waiver of counsel.

The Eighth Circuit recognizes that special concerns are at play when youth waive constitutional rights: “[s]pecial caution is of course required when analyzing the waiver of constitutional rights by juveniles.” *McDonald v. Black*, 820 F.2d 260, 262 (8th Cir. 1987). This is particularly important where “the state’s failure to follow its criminal procedures deprives” a youth “of fundamental fairness in his criminal trial.” *Id.*

Wilkins and *Shafer* do suggest that courts undertake additional measures to assure that youth are validly waiving their constitutional rights. The *Wilkins* court specifically took account of the defendant’s “young age” of sixteen in holding that both his waiver of counsel and guilty plea were invalid. *Wilkins v. Bowersox*, 145 F.3d 1006, 1008, 1013 (8th Cir. 1998). Thus, age is clearly a relevant factor and something that the Eighth Circuit has acknowledged. While age was not an acknowledged factor in *Shafer*, the court took note of Shafer’s mental health history and other characteristics that made him an “impulsive and irrational decision mak[er].” *Shafer v. Bowersox*, 329 F.3d 637, 649 (8th Cir. 2003). The scientific advances that demonstrate the compromised decision-making abilities of youth are what have motivated the Supreme Court in recent decades to provide additional protections for youth. *See, e.g., Miller v. Alabama*, 567 U.S. 460, 471 (2012) (holding mandatory life without parole unconstitutional as applied to children, in part because “children have a ‘lack of maturity and an underdeveloped sense of responsibility,’ leading to recklessness, impulsivity, and heedless risk-taking); *J.D.B. v. North Carolina*, 564 U.S. 261 (holding that age is relevant to *Miranda* custody analysis); *Graham v. Florida*, 560 U.S. 48 (2010) (holding life without parole for nonhomicide offenses categorically unconstitutional as applied to individuals who committed an offense prior to age 18); *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (holding the death penalty unconstitutional as applied to

children). Applying that line of reasoning to the Eighth Circuit's concerns in addressing the colloquies in *Wilkins* and *Shafer* support an argument that a child or adolescent's age should categorically require heightened protections when they waive constitutional rights. While *Wilkins* and *Shafer* may be extreme cases, courts are obliged to require individual assessment regardless of the circumstances.

III. Conclusion

To be constitutionally sufficient, the Eighth Circuit requires state trial courts to conduct a two-part inquiry to determine whether a waiver of counsel is valid. That inquiry is fact-intensive and requires the court to tailor the colloquy to the specific characteristics of the defendant. First, courts must find that a defendant is competent and understands the proceedings. Second, the court must determine that their waiver of rights is knowing and voluntary. Age is one factor in assessing the validity of a waiver of constitutional rights. Furthermore, it is an essential factor to consider, since children and adolescents have less education than adults, little or no experience with the justice system, and may lack the requisite reasoning abilities to consider the consequences of waiver. Where youth are involved, their age likely establishes the necessity for a court to probe further when considering all the factors required for a valid waiver.

Applicant Details

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| |
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|--|

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Applicant Education

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http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90515&yr=2011
 Date of JD/LLB **June 1, 2022**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **Stanford Law Review**
 Moot Court Experience **Yes**
 Moot Court Name(s) **Kirkwood Moot Court Competition**

Bar Admission

Prior Judicial Experience

| | |
|----------------------------------|-----|
| Judicial Internships/Externships | No |
| Post-graduate Judicial Law Clerk | Yes |

Specialized Work Experience

| | |
|-----------------------------|-------------------|
| Specialized Work Experience | Appellate, Pro Se |
|-----------------------------|-------------------|

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 11, 2023

The Honorable Tanya Chutkan
United States District Court for the District of Columbia
333 Constitution Avenue NW
Washington, D.C. 20002

Re: 2024-25 Clerkship Application

Judge Chutkan:

I write to apply for a clerkship in your chambers for the 2024-25 term.

I have the research and writing skills to be an asset to your team. I am a 2022-23 term clerk for Judge J. Michelle Childs on the United States Court of Appeals for the District of Columbia Circuit. During this clerkship, I have encountered a variety of claims, most of which are familiar to the district court. For example, I have handled several cases this year which raised constitutional claims, such as the First Amendment, the Fourth Amendment, the Fourteenth Amendment, the Equal Rights Amendment, and the Speech and Debate Clause. But I have also prepared cases that analyzed several statutory claims, such as the Administrative Procedure Act, the Religious Freedom and Restoration Act, the Rehabilitation Act, the Sunshine Act, the Freedom of Information Act, the First Step Act, and Section 1983. My familiarity with such claims on the D.C. Circuit will aid my analytical speed and accuracy on the district court.

Equally as important, I have experience with trial courts and developing a lower court record. During my internship with the American Civil Liberties Union's Racial Justice Project, I reviewed over 1,000 pages of depositions to prepare substantive parts of the plaintiffs' motion for summary judgment in *Jones v. City of Faribault*—a district court case in Minnesota. I then prepared a document analyzing the key strengths and weaknesses of the over 20 depositions for the lead attorney on the case. Because of my work, the lead attorney asked me to prepare the 42 U.S.C. § 1981 claim of the motion. Thus, I appreciate the attention to detail necessary to parse and understand a trial court record.

I achieved notable honors in law school for my steadfast commitment to justice in and outside of the classroom. The *Stanford Law Review* awarded me the highest honor for my editorial work in creating, developing, and publishing a first-of-its-kind symposium on voting rights. And in Stanford's Criminal Defense Clinic, I was awarded the highest grade for my ability to research, write, analyze, and argue on behalf of three criminal defendants—two in federal court and one in state court. Specifically, I argued in the United States District Court for the Northern District of California on behalf of a criminal defendant who requested an early termination of his supervised release. The judge granted our motion not only in that case but also in our other two cases as well.

This fall, I will return to Jenner and Block in its Washington, D.C. office. As part of that

job, I will complete a two-month fellowship at the Public Defender Service (PDS)—your previous home. After that, I will work on appellate and trial level matters at the firm. It would be an honor to clerk for you thereafter. The skills I have gained thus far coupled with my future experiences at Jenner and Block will ensure my time in your chambers will be successful. Should you want to speak with my references, they are the following:

The Honorable J. Michelle Childs
United States Court of Appeals for the District of Columbia Circuit
J_michelle_childs@cadc.uscourts.gov
803.465.5597

Pamela S. Karlan
Kenneth and Harle Montgomery Professor of Public Interest Law, Stanford Law School
Stanford Law School Co-Director, Supreme Court Litigation Clinic
pkarlan@stanford.edu
650.725.4851

Michelle Anderson
Larry Kramer Professor of Law Professor, Stanford Law School
Professor, Doerr School of Sustainability
manderson@law.stanford.edu
650.498.1149

Ron Tyler
Professor of Law, Stanford Law School
Director, Criminal Defense Clinic
rt Tyler@law.stanford.edu
650.724.6344

Thanks in advance for your consideration.

Sincerely,

Donovan Hicks

Donovan Hicks

DONOVAN HICKS

55 M Street NE, Apt. #540 Washington, DC 20002 | donovanjhicks@gmail.com | 864.357.1681

EDUCATION

Stanford Law School Stanford, CA
J.D., June 2022

- Journals: *Stanford Law Review* (Volume 74: Symposium Editor; Volume 73: Member Editor); *Stanford Journal of Civil Rights and Civil Liberties* (Volume 17: Articles Committee)
- Honors: Judge Thelton E. Henderson Class Prize for Criminal Defense; Jay M. Spears Award for Outstanding Editorial Work for the *Stanford Law Review*
- Activities: Black Law Students Association (Co-President); Teaching Assistant (Civil Procedure, Professor Larry Marshall)

Trinity College, The University of Dublin Dublin, Ireland
M. Phil., *second class honors*, June 2018

- Honors: National George J. Mitchell Scholar

Wofford College Spartanburg, SC
B.A. and B.S., *magna cum laude*, May 2016

- Honors: Phi Beta Kappa; National Harry S. Truman Scholar (SC-15)
- Activities: Student Body Vice President

EXPERIENCE

U.S. Court of Appeals for the District of Columbia Circuit, Washington, D.C. *Law Clerk*, Aug. 2022 – 2023

- Assisting in opinion drafting and oral argument preparation for the Honorable J. Michelle Childs
- Developing and writing speeches on a variety of legal topics

U.S. Dept. of Justice, Civil Rights Division, Washington, D.C. *Legal Extern*, Sept. 2021 – Dec. 2021

- Supported the Principal Deputy Assistant Attorney General for the Civil Rights Division
- Conducted a comprehensive legal and regulatory review of Title VI of the Civil Rights Act of 1964

Williams & Connolly, LLP, Washington, D.C. *Summer Associate*, June 2021 – Aug. 2021

- Wrote part of a successful opening appellate brief in *Harvey v. Cable News Network*, 48 F.4th 257 (4th Cir. 2022), a defamation matter
- Conducted legal research for an opening merits brief in *Badgerow v. Walters*, 142 S. Ct. 1310 (2022), an arbitration matter

American Civil Liberties Union, Racial Justice Project, New York, N.Y. *Legal Intern*, June 2020 – Aug. 2020

- Led the motion for summary judgment's legal research and writing for the 42 U.S.C. § 1981 claim in *Jones v. City of Faribault*, No. 18-1643, 2021 WL 1192466, at *1 (D. Minn. Feb. 18, 2021), a housing discrimination matter
- Contributed to the reply brief in *Jones v. Governor of Fla.*, 975 F.3d 1016 (11th Cir. 2020), a major voting rights matter
- Conducted legal research in *White v. Shwedo*, No. CV 2:19-3083-RMG, 2020 WL 2315800, at *1 (D.S.C. May 11, 2020), a Due Process Clause matter

Jenner & Block, Washington, D.C. *SEO Law Fellow*, May 2019 – July 2019, Aug. 2020, Aug. 2021

- Developed and completed a T-Visa application for a victim of labor trafficking that was subsequently granted

Center for American Progress, Washington, D.C. *Research Assoc.*, Sept. 2018 – May 2019


- Quoted in [The Sunday Guardian](#) and [Newsweek](#); Selected published works: "The Earned Income Tax Credit: A Tool to Weather Hardship," [Real Clear Policy](#); "What Trump Leaves Out When He Talks About the Black Unemployment Rate," [Talk Poverty](#); "6 Communities That Trump's Latest SNAP Proposal Would Hurt Most," [CAP](#)

Georgetown Center on Poverty and Inequality, Washington, D.C. *Policy Assistant*, June 2018 – Sept. 2018

- Contributed research on several ongoing projects, including "[Structural Unsound: The Impact of Block Grants to Fund Economic Security Programs](#)"


Deloitte, Strategy and Operations, Federal Consulting, Washington, D.C. *Fed. Analyst*, Oct. 2016 – Sept. 2017

- Led an incidence response plan at the Federal Deposit Insurance Corporation (FDIC) and increased minimum security requirements strictly for goods at the Customs-Trade Partnership Against Terrorism (C-TPAT)



STANFORD UNIVERSITY
OFFICE OF THE UNIVERSITY REGISTRAR
STANFORD, CA 94305-6032

Name: Hicks, Donovan Jordan
Student ID: 05785249



Johanna Metzgar
Registrar

In accordance with USC 438 (6) (4) (8) (The Family Educational Rights and Privacy Act of 1974), you are hereby notified that this information is provided upon the condition that you, your agents or employees will not permit any other party access to this record without consent of the student. Alteration of this transcript may be a criminal offense.

Print Date: 12/18/2022

—— Stanford Degrees Awarded ——

Degree : Doctor of Jurisprudence
Confer Date : 06/12/2022
Plan : Law

—— Academic Program ——

Program : Law JD
09/23/2019 : Law (JD)
Completed Program

—— Beginning of Academic Record ——

2019-2020 Spring

All spring LAW courses graded MPH/F (Mandatory Pass-Health) due to pandemic.

| Course | Title | Attempted | Earned | Grade |
|----------|--|-----------|--------|-------|
| LAW 217 | PROPERTY Michelle Anderson | 4.00 | 4.00 | MPH |
| LAW 224B | FEDERAL LITIGATION IN A GLOBAL CONTEXT: METHODS AND PRACTICE Ji Seon Song | 2.00 | 2.00 | MPH |
| LAW 7010 | CONSTITUTIONAL LAW: THE FOURTEENTH AMENDMENT Jane Schacter | 3.00 | 3.00 | MPH |
| LAW 7838 | HISTORY OF CIVIL RIGHTS LAW Rabia Belt | 2.00 | 2.00 | MPH |

2020-2021 Autumn

| Course | Title | Attempted | Earned | Grade |
|----------|--|-----------|--------|-------|
| LAW 807X | POLICY PRACTICUM: SELECTIVE DE-POLICING: OPERATIONALIZING CONCRETE REFORMS David Sklansky; Debbie Mukamal; Ralph Banks Robert Weisberg | 3.00 | 3.00 | H |
| LAW 2402 | EVIDENCE David Sklansky | 4.00 | 4.00 | P |
| LAW 7041 | STATUTORY INTERPRETATION Jane Schacter | 3.00 | 3.00 | P |
| LAW 7101 | ELECTION 2020 James Steyer; Pamela Karlan | 1.00 | 1.00 | MP |

2020-2021 Winter

| Course | Title | Attempted | Earned | Grade |
|----------|---|-----------|--------|-------|
| LAW 400 | DIRECTED RESEARCH Michelle Anderson | 3.00 | 3.00 | H |
| LAW 7001 | ADMINISTRATIVE LAW David Freeman Engstrom | 4.00 | 4.00 | P |
| LAW 7044 | SUPREME COURT SIMULATION SEMINAR Lawrence Marshall | 3.00 | 3.00 | P |
| LAW 7051 | LOCAL GOVERNMENT LAW Michelle Anderson | 3.00 | 3.00 | P |

2019-2020 Autumn

| Course | Title | Attempted | Earned | Grade |
|----------|--|-----------|--------|-------|
| LAW 201 | CIVIL PROCEDURE I Diego Zambrano | 5.00 | 5.00 | P |
| LAW 205 | CONTRACTS Barbara Fried | 5.00 | 5.00 | P |
| LAW 219 | LEGAL RESEARCH AND WRITING Yanbai Andrea Wang | 2.00 | 2.00 | P |
| LAW 223 | TORTS John Donohue | 5.00 | 5.00 | P |
| LAW 240D | DISCUSSION (1L): CRIMINAL LEGAL HISTORIES George Fisher | 1.00 | 1.00 | MP |

2019-2020 Winter

Some winter LAW courses graded MPH/F (Mandatory Pass-Health) due to pandemic.

| Course | Title | Attempted | Earned | Grade |
|----------|--|-----------|--------|-------|
| LAW 203 | CONSTITUTIONAL LAW Pamela Karlan | 3.00 | 3.00 | MPH |
| LAW 207 | CRIMINAL LAW Lawrence Marshall | 4.00 | 4.00 | MPH |
| LAW 224A | FEDERAL LITIGATION IN A GLOBAL CONTEXT: COURSEWORK Ji Seon Song | 2.00 | 2.00 | MPH |
| LAW 2401 | ADVANCED CIVIL PROCEDURE Diego Zambrano | 3.00 | 3.00 | MPH |
| LAW 7018 | CRITICAL RACE THEORY Kenneth Mack | 1.00 | 1.00 | MP |


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STANFORD UNIVERSITY

OFFICE OF THE UNIVERSITY REGISTRAR

STANFORD, CA 94305-6032

Name: Hicks, Donovan Jordan

Student ID: 05785249



Johanna Metzgar

Registrar

VERIFIED STANFORD OFFICIAL TRANSCRIPT IN PDF FORMAT ONLY

2020-2021 Spring

| Course | Title | Attempted | Earned | Grade |
|----------|---|-----------|--------|-------|
| LAW 904A | CRIMINAL DEFENSE CLINIC: CLINICAL PRACTICE Ronald Tyler; Suzanne Luban | 4.00 | 4.00 | H |
| LAW 904B | CRIMINAL DEFENSE CLINIC: CLINICAL METHODS Ronald Tyler; Suzanne Luban | 4.00 | 4.00 | P |
| LAW 904C | CRIMINAL DEFENSE CLINIC: CLINICAL COURSEWORK Ronald Tyler; Suzanne Luban | 4.00 | 4.00 | H |

Transcript Note: Judge Thelton E. Henderson Prize for Outstanding Performance

2021-2022 Spring

| Course | Title | Attempted | Earned | Grade |
|----------|---|-----------|--------|-------|
| LAW 1047 | BUSINESS, SOCIAL RESPONSIBILITY, AND HUMAN RIGHTS Jamie O'Connell | 3.00 | 3.00 | P |
| LAW 7081 | FAMILY LAW II: PARENT-CHILD RELATIONSHIPS Ralph Banks | 3.00 | 3.00 | P |
| LAW 7837 | ADVANCED LEGAL WRITING: PUBLIC INTEREST LITIGATION Matthew Sanders | 3.00 | 3.00 | MP |

2021-2022 Autumn

| Course | Title | Attempted | Earned | Grade |
|----------|--|-----------|--------|-------|
| LAW 881 | EXTERNSHIP COMPANION SEMINAR Michael Winn | 2.00 | 2.00 | MP |
| LAW 882 | EXTERNSHIP, CIVIL LAW Michael Winn | 6.00 | 6.00 | MP |
| LAW 1033 | TRUSTS AND ESTATES B. Pearson | 2.00 | 2.00 | P |
| LAW 7820 | MOOT COURT Lisa Pearson; Randee Ferner | 2.00 | 2.00 | MP |

2021-2022 Winter

| Course | Title | Attempted | Earned | Grade |
|----------|---|-----------|--------|-------|
| LAW 8004 | LEGAL ETHICS: THE PLAINTIFFS' LAWYER Nora Engstrom | 3.00 | 3.00 | P |
| LAW 8016 | REFORMING THE PROFESSION: OPPORTUNITIES AND CHALLENGES FACING TOMORROW'S LAWYERS Jason Solomon; Michael Callahan | 3.00 | 3.00 | P |
| LAW 7059 | LABOR LAW William Gould | 3.00 | 3.00 | P |
| LAW 7820 | MOOT COURT Lisa Pearson; Randee Ferner | 1.00 | 1.00 | MP |
| LAW 7821 | NEGOTIATION Janet Martinez | 3.00 | 3.00 | MP |

END OF TRANSCRIPT

Page 2 of 2

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Office of the University Registrar
Stanford University
Stanford, California 94305-6032

Grade point average and rank in class are not computed and are not available. Four grading systems are used at Stanford University. The general University grading system is used in all courses except those taught in the School of Law, the Graduate School of Business, or to M.D. students in the School of Medicine.

Unit of Credit: Every unit for which credit is given is understood to represent approximately three hours of actual work per week for the average student. Thus, in lecture or discussion work, for 1 unit of credit, one hour per week may be allotted to the lecture or discussion and two hours for preparation or subsequent reading and study. Where the time is wholly occupied with studio, field, or laboratory work, or in the classroom work of conversation classes, three full hours per week through one quarter are expected of the student for each unit of credit; but, where such work is supplemented by systematic outside reading or experiment under the direction of the instructor, a reduction may be made in the actual studio, field, laboratory, or classroom time as seems just to the department.

Academic programs include a status effective the day the transcript was printed. Stanford University uses the following program statuses: Active: Student is currently active in the program indicated.

Leave of Absence: Student is currently on an official leave of absence from active study.

Completed: Student program requirements have been met and the degree has been awarded (degree programs only).

Discontinued: Student no longer enrolled in program (includes post-doctoral scholars whose appointments have ended).

Dismissed: Student was dismissed from the University.

Cancelled: Student deceased while enrolled and program cancelled or student administratively withdrawn for cause.

CHRONOLOGY OF GENERAL UNIVERSITY GRADING SYSTEM
Current (effective Summer Quarter 2008-09):

| | |
|--------|--|
| A(+/-) | Excellent |
| B(+/-) | Good |
| C(+/-) | Satisfactory |
| D(+/-) | Minimal Pass |
| NP | Not Passed |
| CR | Credit (student-elected satisfactory: A, B, or C equivalent) |
| S | No-option Satisfactory (A, B, or C equivalent) |
| NC | No Credit (unsatisfactory performance, D+ or below equivalent) |
| I | Incomplete |
| L | Pass, letter grade to be reported |
| N | Continuing Course |
| RP | Repeated Course |
| GNR | Grade Not Reported |
| W | Withdraw |

Note: The notation * was changed to GNR (Grade Not Reported).

Spring Quarter 2019-20: All undergraduate and graduate courses graded Satisfactory/No Credit (SNC).

Effective Autumn Quarter 1993-96:

| | |
|--------|--|
| A(+/-) | Excellent |
| B(+/-) | Good |
| C(+/-) | Satisfactory |
| D(+/-) | Minimal Pass |
| NP | Not Passed |
| CR | Credit (student-elected satisfactory: A, B, or C equivalent) |
| S | No-option Satisfactory (A, B, or C equivalent) |
| NC | No Credit (unsatisfactory performance, D+ or below equivalent) |
| I | Incomplete |
| L | Pass, letter grade to be reported |
| N | Continuing Course |
| RP | Repeated Course |
| * | No Grade Reported |
| W | Withdraw |

Autumn Quarter 1994-95: RP was introduced to replace the original grade for a course later retaken. The grade of I (incomplete) was changed to automatically lapse to NP or NC after one year.

Effective Autumn Quarter 1989-90:

| | |
|--------|--|
| A(+/-) | Exceptional Performance |
| B(+/-) | Superior Performance |
| C(+/-) | Satisfactory Performance |
| D(+/-) | Minimal Pass |
| L | Pass, letter grade to be reported |
| + | Satisfactory, student elected (A, B, or C) |
| S | Satisfactory, no option (A, B, or C) |
| N | Continuing Courses |
| * | No Grade Reported |
| I | Incomplete |

Note: The P notation has been changed to S (Satisfactory). The lowest acceptable grade for either S or "+" is now C-.

Effective Autumn Quarter 1975-76:

| | |
|--------|---------------------------------------|
| A(+/-) | Exceptional Performance |
| B(+/-) | Superior Performance |
| C(+/-) | Satisfactory Performance |
| D(+/-) | Minimal Pass |
| L | Pass, letter grade to be reported |
| + | Pass, student elected (A, B, C, or D) |
| P | Pass, no option (A, B, C, or D) |
| N | Continuing Courses |
| * | No Grade Reported |
| I | Incomplete |

Note: Under this system, Stanford restored the D grade, defining it as 'Minimal Pass.' Pass notations (+ and P) were redefined to encompass all passing grades, A through D.

Summer Quarter 1972-73: P was introduced to denote pass in a course offered only pass/no credit at the option of the instructor.

Spring Quarter 1971-72: "+" and "-" as grade modifiers were reintroduced for all students.

Autumn Quarter 1971-72: "+" and "-" as grade modifiers were reintroduced for graduate students.

Effective Autumn Quarter 1970-71:

| | |
|---|------------------------------------|
| A | Exceptional Performance |
| B | Superior Performance |
| C | Satisfactory Performance |
| L | Pass, letter grade to be reported |
| + | Pass, student elected (A, B, or C) |
| N | Continuing Course |
| * | No Grade Reported |
| I | Incomplete |

Note: The grades A, B, C, and "+" were redefined: D, E, F, W, and "-" were dropped from the grading system. Under the prior system, the University maintained records of all courses a student attempted. But under the revised system, the only courses recorded were those that were successfully completed or for which an I (incomplete) grade was given. The revised system also allowed a student or instructor to request the deletion of an I grade from a student's record if the student did not meet the requirements of the course within the time limit determined by the instructor. The use of the modifying suffixes "+" and "-" appended to letter grades was discontinued.

Effective Autumn Quarter 1963-64:

| | |
|---|-------------------------------|
| A | Excellent |
| B | Good |
| C | Satisfactory |
| D | Minimum Credit |
| E | Conditioned |
| F | Failed |
| N | Continuous Course |
| W | Unauthorized Withdrawal |
| I | Incomplete |
| * | No Grade Reported |
| + | Passed Without Defining Grade |
| - | Failed Course Taken Pass/Fail |

Prior to Autumn Quarter 1963-64:

| | |
|---|-------------------------------|
| A | Excellent |
| B | Good |
| C | Fair |
| D | Barely Passed |
| E | Conditioned |
| F | Failed |
| N | Continuous Course |
| W | Unauthorized Withdrawal |
| I | Incomplete |
| * | No Grade Reported |
| + | Passed Without Defining Grade |
| - | Failed Course Taken Pass/Fail |

CHRONOLOGY OF THE SCHOOL OF LAW GRADING SYSTEM
Effective Autumn Quarter 2008-10, units earned in School of Law are quarter units. Units earned in School of Law prior to 2009-10 are semester units.

Current (effective Autumn 2008-09):

| | |
|------|--|
| H | Honors (exceptional work, significantly superior to the average performance at the school) |
| P | Pass (successful mastery of the course material) |
| R | Restricted Credit (work that is unsatisfactory) |
| F | Fail (work that does not show minimally adequate mastery of the material) |
| MP | Mandatory Pass (representing P or better work) |
| MP-H | Mandatory Pass - Public Health Emergency (effective during the 2020 global pandemic) |
| N | Continuing Course |
| I | Incomplete |
| * | No Grade Reported |
| GNR | Grade Not Reported (effective Autumn Quarter 2008-10) |

Spring Quarter 2019-20: All Law courses graded Mandatory Pass-Health (MPH).

Note: Under this grading system, in 2008-09 third-year J.D. students remained under the prior grading system (below).

Effective Autumn 2001-02:

| | |
|--------------------|--------------------------|
| 4.3, 4.2 | A+ |
| 4.1, 4.0, 3.9 | A |
| 3.8, 3.7, 3.6, 3.5 | A- |
| 3.4, 3.3, 3.2 | B+ |
| 3.1, 3.0, 2.9 | B |
| 2.8, 2.7, 2.6, 2.5 | B- |
| 2.2 | Restricted Credit |
| 2.1 | Failure |
| I | Incomplete |
| K | Credit (student elected) |
| KM | Credit (mandatory) |
| RK | Restricted Credit |
| NK | Failure |
| N | Continuing Course |
| * | No Grade Reported |

Note: The grading system was revised to a number system with letter equivalents and the grades of 2.3 and 2.4 (C+) were eliminated.

Effective Autumn 1983-84:

| | |
|----|--------------------------|
| A+ | 4.3, 4.2 |
| A | 4.1, 4.0, 3.9 |
| A- | 3.8, 3.7, 3.6, 3.5 |
| B+ | 3.4, 3.3, 3.2 |
| B | 3.1, 3.0, 2.9 |
| B- | 2.8, 2.7, 2.6, 2.5 |
| C+ | 2.4, 2.3 |
| R | 2.2 (restricted credit) |
| F | 2.1 (failure) |
| N | Continuing Course |
| I | Incomplete |
| * | No Grade Reported |
| K | Credit (student elected) |
| KM | Credit (mandatory) |
| RK | Restricted Credit |

Note: The C, C-, D+, D and D- grades were eliminated. The grade of R (Restricted Credit) was introduced with the value of 2.2. The RK and F grades were redefined to a value of 2.2 and 2.1 respectively. Students may elect to take a limited number of courses on the K, RK, NK system. K shall be awarded for work that is comparable to numerical grades 4.3-2.3, RK for 2.2, an NK for 2.1.

Effective Autumn 1969: A second grading system was introduced with the following values:

| | |
|----|-------------------------------|
| K | Credit (1.7 - 4.3) |
| RK | Restricted Credit (0.9 - 1.6) |
| NK | No Credit (0 - 0.8) |

Prior to Autumn 1969-70:

| | |
|----|--------------------|
| A+ | 4.3, 4.2 |
| A | 4.1, 4.0, 3.9 |
| A- | 3.8, 3.7, 3.6, 3.5 |
| B+ | 3.4, 3.3, 3.2 |
| B | 3.1, 3.0, 2.9 |
| B- | 2.8, 2.7, 2.6, 2.5 |
| C+ | 2.4, 2.3 |
| C | 1.9, 2.0, 2.1 |
| D+ | 1.8, 1.7, 1.6, 1.5 |
| D | 1.4, 1.3, 1.2 |
| D- | 1.1, 1.0, 0.9 |
| D | 0.8, 0.7, 0.6 |
| F | 0.0 |

Note: This system employs letter grades with numerical equivalents.

THE SCHOOL OF MEDICINE GRADING SYSTEM

The following grades are used in reporting on the performance of students in the M.D. program:

| | |
|-----|---|
| + | Pass. Indicates that the student has demonstrated to the satisfaction of the department or teaching group responsible for the course that she mastered the material taught in the course. |
| - | Fail. Indicates that the student has not demonstrated to the satisfaction of the department or teaching group responsible for the course that he or she has mastered the material taught in the course. |
| EX | Exempt. Course exempted by examination. No units granted. |
| N | Continuing Course |
| I | Incomplete |
| GNR | Grade Not Reported (effective Autumn Quarter 2008-10) |

CHRONOLOGY OF THE GRADUATE SCHOOL OF BUSINESS GRADING SYSTEM

Current (Effective Autumn 2000-01):

| | |
|-----|--|
| H | Honors |
| HP | High Pass |
| P | Pass |
| LP | Low Pass |
| U | Unsatisfactory |
| EX | Course Exempted (does not affect grade point calculations) |
| + | Pass (LP or better) |
| GNR | Grade Not Reported (effective Autumn Quarter 2008-10) |

Effective Autumn Quarter 1971-72:

| | |
|----|---|
| H | Distinction. Work that is of markedly superior quality. |
| P+ | Work that is of high quality and exceeds in a significant way all of the basic requirements of the course. |
| P | Pass. Work that is of good quality and clearly satisfies all the basic requirements of the course. |
| P- | Low Pass. Work that satisfies most of the basic requirements of the course but is deficient in some minor way. |
| U | Unsatisfactory. Work that does not satisfy the basic requirements of the course and is deficient in significant ways. |
| EX | Course Exempted (does not affect grade point calculations) |
| + | Pass (P- or better) |

JENNY S. MARTINEZ

Richard E. Lang Professor of Law
and Dean

Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
Tel 650 723-4455
Fax 650 723-4669
jmartinez@law.stanford.edu

Stanford Grading System

Dear Judge:

Since 2008, Stanford Law School has followed the non-numerical grading system set forth below. The system establishes “Pass” (P) as the default grade for typically strong work in which the student has mastered the subject, and “Honors” (H) as the grade for exceptional work. As explained further below, H grades were limited by a strict curve.

| | | |
|----------------|---|--|
| H | Honors | Exceptional work, significantly superior to the average performance at the school. |
| P | Pass | Representing successful mastery of the course material. |
| MP | Mandatory Pass | Representing P or better work. (No Honors grades are available for Mandatory P classes.) |
| MPH | Mandatory Pass - Public Health Emergency* | Representing P or better work. (No Honors grades are available for Mandatory P classes.) |
| R | Restricted Credit | Representing work that is unsatisfactory. |
| F | Fail | Representing work that does not show minimally adequate mastery of the material. |
| L | Pass | Student has passed the class. Exact grade yet to be reported. |
| I | Incomplete | |
| N | Continuing Course | |
| [blank] | | Grading deadline has not yet passed. Grade has yet to be reported. |
| GNR | Grade Not Reported | Grading deadline has passed. Grade has yet to be reported. |

In addition to Hs and Ps, we also award a limited number of class prizes to recognize truly extraordinary performance. These prizes are rare: No more than one prize can be awarded for every 15 students enrolled in a course. Outside of first-year required courses, awarding these prizes is at the discretion of the instructor.

* The coronavirus outbreak caused substantial disruptions to academic life beginning in mid-March 2020, during the Winter Quarter exam period. Due to these circumstances, SLS used a Mandatory Pass-Public Health Emergency/Restricted Credit/Fail grading scale for all exam classes held during Winter 2020 and all classes held during Spring 2020.

For non-exam classes held during Winter Quarter (e.g., policy practicums, clinics, and paper classes), students could elect to receive grades on the normal H/P/Restricted Credit/Fail scale or the Mandatory Pass-Public Health Emergency/Restricted Credit/Fail scale.

Page 2

The five prizes, which will be noted on student transcripts, are:

- the Gerald Gunther Prize for first-year legal research and writing,
- the Gerald Gunther Prize for exam classes,
- the John Hart Ely Prize for paper classes,
- the Hilmer Oehlmann, Jr. Award for Federal Litigation or Federal Litigation in a Global Context, and
- the Judge Thelton E. Henderson Prize for clinical courses.

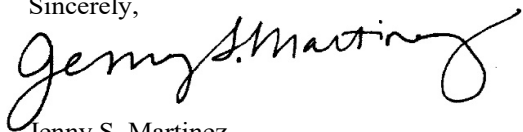
Unlike some of our peer schools, Stanford strictly limits the percentage of Hs that professors may award. Given these strict caps, in many years, *no student* graduates with all Hs, while only one or two students, at most, will compile an all-H record throughout just the first year of study. Furthermore, only 10 percent of students will compile a record of three-quarters Hs; compiling such a record, therefore, puts a student firmly within the top 10 percent of his or her law school class.

Some schools that have similar H/P grading systems do not impose limits on the number of Hs that can be awarded. At such schools, it is not uncommon for over 70 or 80 percent of a class to receive Hs, and many students graduate with all-H transcripts. This is not the case at Stanford Law. Accordingly, if you use grades as part of your hiring criteria, we strongly urge you to set standards specifically for Stanford Law School students.

If you have questions or would like further information about our grading system, please contact Professor Michelle Anderson, Chair of the Clerkship Committee, at (650) 498-1149 or manderson@law.stanford.edu. We appreciate your interest in our students, and we are eager to help you in any way we can.

Thank you for your consideration.

Sincerely,



Jenny S. Martinez
Richard E. Lang Professor of Law and Dean

Updated May 2020

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June 11, 2023

The Honorable Tanya Chutkan
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 2528
Washington, DC 20001

Dear Judge Chutkan:

There are countless reasons I am confident Donovan Hicks will make a wonderful law clerk: He thinks carefully and deeply about legal issues; he speaks about these issues in an articulate manner, and he writes about them clearly and effectively. Donovan does all these things, moreover, with a keen sensitivity to the social contexts in which many of the issues we study in law school arise. He has emerged as a natural leader in the law school community and is universally respected among his classmates. In sum, he is a terrific human being and will be a magnificent lawyer—and law clerk.

I initially encountered Donovan on the first day of my Criminal Law course, during which he made several insightful remarks about the intersection of race and the criminal justice system. Donovan continued to dazzle with his remarks on an array of doctrinal and policy topics throughout the quarter. I was not at all surprised when he wrote a very strong final examination, exhibiting a command of the subject on many different levels, as well as strong writing ability.

Based on his performance in my class, I hired Donovan to serve as my Teaching Assistant the following year. His performance was excellent, by any measure. He persuaded me to administer a number of short examinations throughout the quarter and then threw himself into making elaborate comments on each of those examinations. Those comments were not only strong on their merits—they also exhibited an extraordinarily strong work ethic, in that he needed to turn around 30 examinations (each time) within just a few days. I know that the students adored Donovan for his help with understanding the material and his general wisdom about law school and life.

My most recent exposure to Donovan came in my Supreme Court Simulation Seminar in the winter quarter of 2021. This course calls on students to serve as particular justices, as they hear arguments in cases currently pending before the Court. Each student also argues one such case. And each student then writes either a majority or a dissenting opinion, while the other students who are considering joining that opinion make suggestions or even demand changes as a condition of their joining. All in all, it is the closest experience the Law School offers to a judicial clerkship, in that the students are actually writing in the voices of judges deciding actual cases (based on the actual briefs that have been filed). As you might expect, the course tends to attract some of the Law School's strongest students—most of whom are destined for clerkships—and the caliber of the students' performance is very high.

Donovan performed strongly in this course. His questioning from the bench was direct and effective, as was his oral argument in the *Brnovich* (Arizona voting rights) case. His primary opinion was a dissent in the *Pham* case (detention of non-residents). That dissent, written in the voice of Justice Barrett—the role he was assigned for the quarter—required careful statutory analysis implicating both the language of the statute and various canons of construction. It was good to see that, in addition to his agility with broader policy issues, Donovan also has the capacity to engage in this sort of microanalysis.

All that vital information said, there is no hiding that Donovan's transcript is not the strongest Stanford Law School transcript you likely will see. But I urge you to recognize that a student's performance on a three-hour examination is not the best gauge of that students' skill set with regard to the kinds of writing and analysis that lawyers and law clerks actually do. To be sure, it is a valuable proxy in the absence of more direct information, but there is far more direct information available here: I am in a position to provide first-hand testimony about Donovan's strengths. They are far stronger than his transcript alone indicates.

On a human level, Donovan is a gentle and kind person, with a wonderful sense of humor. I know the phrase is overused, but Donovan really does have a magnetic personality—a trait I observed closely as he worked with students as my Teaching Assistant.

I am genuinely excited to recommend Donovan for your consideration. If I can provide any further information to help you assess his candidacy, please let me know.

Sincerely,

/s/ Lawrence C. Marshall

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June 11, 2023

The Honorable Tanya Chutkan
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Dear Judge Chutkan:

Donovan Hicks, who graduated from Stanford in 2022 and is currently clerking for Judge Michelle Childs on the D.C. Circuit, has applied for a clerkship in your chambers. I think the world of Donovan and recommend him with great enthusiasm.

Writing for Donovan is different than writing for most of the students I've recommended because I've seen his work in two very different settings.

I first met Donovan during the winter of his first year of law school, when he was a student in my relatively large (60 person) Constitutional Law I class. The class covered structural issues: judicial review; separation of powers; federalism; and congressional power under the commerce clause and the Fourteenth Amendment. Donovan stood out, from the very beginning, as one of the most enthusiastic class participants. He was always superbly prepared and he asked great questions. He was also intellectually fearless.

While COVID-19 meant that we did not provide conventional grades to the students in the class, I reviewed Donovan's in-term writing assignments (done prior to the pandemic) and his final examination (written after we went into lockdown) and together, they showed that he was well on track to develop the skills necessary to be a fine law clerk. He writes well, he uses cases effectively to make his points, and he spots the important issues. I particularly liked his essay comparing the Supreme Court's decisions in *Sessions v. Morales-Santana* and *Shelby County v. Holder*, where Donovan offered a very cogent discussion of how malleable baselines can be in constitutional cases.

To be honest, if all I knew about Donovan was about his classroom performance, I would say his abilities place him in the broad middle of an exceptionally talented cohort. You may well see Stanford applicants with more impressive transcripts. But my other experiences with Donovan convince me that he is one of those students whose performances on law school exams dramatically understate his abilities. One example stands out particularly for me. During the spring of his first year, one of my colleagues insisted on reading aloud in class an excerpt from an historical document that contained a deeply offensive racial epithet. Donovan, as one of the leaders of Stanford's Black Law Students Association, drafted a letter to the student body that another of my colleagues rightly characterized as a rhetorical masterpiece. Not only was it elegantly and powerfully written, but it was deeply courageous.

But although the email expressed a (very understandable) anger, it did so with real delicacy. And Donovan is not an angry person. Between the winter of 2020 and the summer of 2022, I probably spent more time outside of class talking to Donovan (along with two very different classmates who have formed a sort of triumvirate with him) than with any student outside of my clinic. In all those discussions, he showed good humor, gentleness, support for classmates, and a passionate interest in a wide variety of legal issues. You would love having him around chambers.

In addition to his traditional classroom work, Donovan also participated in a policy practicum for the Criminal Justice Center, where he produced Honors-caliber work. I've read the report to which Donovan contributed on alternatives to policing in traffic enforcement (available [here](#)). I think it's a really first-rate piece of work. And he received one of the book prizes for his clinical work in the Criminal Defense Clinic.

Finally, although I did not get to see Donovan's coursework during his second and third years of law school, I did work with Donovan for a quarter as my intern while I was serving as head, and then principal deputy assistant attorney general, at the Civil Rights Division. There, I saw first-hand Donovan's ability to manage complex and competing workflows. He did a number of short-term, relatively descriptive projects for other front-office colleagues. At the same time, he worked on a longer project for me updating a complex analytical document on an issue that you might think has long been settled, but repeatedly arises in the Division: what exactly is our litigating authority over constitutional violations? I thought Donovan did a very solid job confronting an issue with which he was completely unfamiliar.

I imagine that Donovan's own cover letter to you will set out his challenges in more detail, so I'll just note here that Donovan has been breaking barriers all his life — first in his family to go to college (on a full-ride, merit-based national scholarship), first person from his college to become a Harry S Truman Scholar, first person from his college to win a George Mitchell scholarship. In short, Donovan a highly qualified and gifted young African American person from the South who has experienced, and overcome, a

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legacy of exclusion.

I hope this letter conveys my tremendous enthusiasm for Donovan's application. If you have any questions, please contact me. You can reach me either by email (karlan@stanford.edu), at my office (650.725.4851), or on my cellphone (650.520.4851).

Sincerely,

/s/ Pamela S. Karlan

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June 11, 2023

The Honorable Tanya Chutkan
E. Barrett Prettyman United States Courthouse
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Dear Judge Chutkan:

I am writing to enthusiastically endorse Donovan Hicks for a clerkship in your chambers. While at Stanford, Donovan was a standout member of the Criminal Defense Clinic, which I direct. Donovan earned the Thelton E. Henderson Prize for Outstanding Performance in Clinical Coursework.

Donovan enrolled in my clinic for the 2021 spring quarter. Teaching and learning in a direct services clinic remotely during the height of the pandemic was extremely challenging. Donovan was one of the rare students who exceeded academic expectations in that environment while making enduring connections with faculty and students, alike.

Placement in the Criminal Defense Clinic is a competitive process. As a former long-time Assistant Federal Public Defender, I am committed to high quality indigent defense. Regardless of their future career goals, applicants to my clinic must demonstrate intellectual competence and a true service orientation.

Donovan Hicks was a strong clinic applicant. He was an editor on the Stanford Law Review and also on the Stanford Journal of Civil Rights and Civil Liberties. Prior to law school, he received a Master's degree from Trinity College in Dublin as a George Mitchell scholar. He was a Phi Beta Kappa, magna cum laude graduate from Wofford College. Donovan also had a substantial record of useful, non-academic experience, including a stint as an analyst for Deloitte and as a research fellow at the Georgetown Center on Poverty and Inequality.

During his Stanford 1L summer, Donovan interned with the American Civil Liberties Union's Racial Justice Project conducting research and writing on several matters. I was convinced that his combination of intellect, law journal editing, and actual advocacy would inure to the benefit of our clinic clients. In fact, Donovan was exceptional.

I am aware that many of Donovan's other law school grades were average, albeit at an elite law school. However, I spent a full quarter closely teaching Donovan and supervising his work. He is smart. He is an excellent writer. He is a warm collaborator. He was truly a gem in my clinic.

The students in the Criminal Defense Clinic during Donovan's quarter represented a variety of clients: federal defendants in post-conviction status moving for early termination of supervision; state defendants seeking pretrial release; and others seeking sealing of state records of dismissed cases. The students also drafted a joint report on federal and state summons practices. This was a lot of work to complete in a ten-week quarter. Donovan excelled in each area. He quickly assimilated extensive case files, learned federal sentencing rules, analyzed state discovery, researched caselaw, and drafted high-quality pleadings—all while facing real-world time pressure.

Donovan worked on two federal motions for early termination of supervised release with his teammates. In one such case, he had primary responsibility for drafting the introduction, argument, and conclusion—the essential components of the brief. His writing was crisp; his analysis was excellent. In the second federal case, Donovan worked collaboratively to research and draft a superb memo. He also had sole authorship of a supplemental memorandum to our cooperating counsel laying out the client's potential exposure to new fraud charges. The memo was pithy, yet comprehensive. Cooperating counsel described it as extremely helpful.

Donovan conducted the oral argument in his team's second federal case—which was postponed until after the end of the quarter. He obtained permission from his summer firm (Williams & Connolly) to appear remotely for argument, a true sign of his commitment to the case. In the hearing that summer before the district court, Donovan argued passionately and with purpose. Although the judge denied the motion, she encouraged the defense to raise the matter again; six months later, she granted it.

Donovan was a matchless member of the Criminal Defense Clinic. He was one of the best contributors in workshops. His insights were thoughtful and articulate. He also created a welcoming environment for others. Without fail, he praised the contributions of his clinic mates. He was genuine, upbeat, and empathetic. His warmth was infectious. Those qualities served him well when a problem arose within his three-person clinic team. Donovan was courageous and vulnerable. He made huge efforts to help heal the team's divisions. The team's ultimate reconciliation and success was due in large part to Donovan's persistence, kindness, and empathy.

As I am sure that Judge Michelle Childs discovered in their time together, Donovan will be a truly valued clerk. He possesses the
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necessary academic grounding and skills. His exposure to criminal defense will be a particularly useful asset. And as you will see if you have the opportunity to meet him, Donovan is simply a delightful, enjoyable presence. He will warm your chambers.

I heartily recommend Donovan Hicks for a clerkship in your chambers.

Sincerely,

/s/ Ronald C. Tyler

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Donovan Hicks

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WRITING SAMPLE

Below is an opinion I drafted in its entirety during my current clerkship on the United States Court of Appeals for the District of Columbia Circuit. This is the unedited version that I sent to Judge Childs. The primary question was whether a plaintiff plausibly alleged that the district court had personal jurisdiction over two foreign defendants. Because the plaintiff had not alleged sufficient minimum contacts with the United States, the panel affirmed the district court that it did not have personal jurisdiction. This opinion is now published in the Federal Reporter. *Lewis v. Mutond*, 62 F.4th 587 (D.C. Cir. 2023).

Before: KATSAS, RAO, and CHILDS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* CHILDS.

CHILDS, *Circuit Judge*: Appellant Darryl Lewis, a United States citizen and veteran, alleges Appellees Kalev Mutond and Alexis Tambwe Mwamba (Foreign Officials) detained and tortured him in the Democratic Republic of the Congo (DRC). Lewis argues that the Foreign Officials did so to extract a false confession that he was an American mercenary. That is enough, in Lewis's view, to establish that the district court had personal jurisdiction over the Foreign Officials. If not, he asserts alternatively that jurisdictional discovery is warranted. We disagree and affirm the district court on both questions.

I.

A.

In 2016, Lewis was a security advisor to a former DRC presidential candidate. That same year, Kalev Mutond was the General Administrator of the DRC's National Intelligence Agency (ANR), and Alexis Tambwe Mwamba was the DRC's Minister of Justice.

The Foreign Officials allegedly acted in concert to detain and torture Lewis for over six weeks in violation of the Torture Victim Protection Act (TVPA). Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at note following 28 U.S.C. § 1350). He was interrogated for hours, fed small meals at irregular intervals, deprived of sleep, and denied essential hygiene products. Neither Lewis's employer, family, nor counsel could contact him.

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The purported goal of Lewis’s detention was to extract a false confession that he was one of many American mercenaries working with the then-DRC President’s political opponent to undermine the government. While in prison, Official Mutond taunted him with the accusation. Compl. ¶ 31, J.A. 11. After Lewis failed to confess, Official Tambwe publicly claimed at a press conference that Lewis was a mercenary sent to assassinate the then-President of the DRC. Official Tambwe’s supposed proof was two-fold: first, he showed a picture of Lewis carrying a machine gun; second, he contended that since October 2015, 600 United States citizens, men, and ex-soldiers entered the DRC as part of a “plot” to “destabilize” its government. Compl. ¶ 35, J.A. 12. Accordingly, Official Tambwe ordered the DRC’s prosecutor general to explore whether Lewis’s former boss, the opposition presidential candidate, had American and South African mercenaries working for him. Lewis alleges, however, that the Foreign Officials routinely single out Americans “because they are Americans and, in the case of veterans[,] . . . because they are veterans.” Compl. ¶ 39, J.A. 12–13.

In response to the Foreign Officials’ allegations of American involvement, the United States Embassy in the DRC released a statement that denied the claims by Official Tambwe. Compl. ¶ 40, J.A. 13. It stated, “We are aware of the detention . . . of an American citizen who was working in Katanga as a security advisor. [] Lewis was not armed and allegations he was involved in mercenary activity are false.” Compl. ¶ 40, J.A. 13; *U.S. Embassy Concerned About Reported False Accusations of Mercenary Activities*, U.S. Embassy in the Democratic Republic of the Congo (May 5, 2016), <https://cd.usembassy.gov/u-s-embassy-concerned-reported-false-accusations-mercenary-activities/> (last visited Jan. 2023).¹

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B.

The district court dismissed Lewis's complaint for lack of personal jurisdiction. It also denied Lewis's request for jurisdictional discovery.

Lewis timely appealed. We have appellate jurisdiction under 28 U.S.C. § 1291. We review the district court's dismissal for lack of personal jurisdiction de novo and the denial of jurisdictional discovery for abuse of discretion. *Livnat v. Palestinian Auth.*, 851 F.3d 45, 48 (D.C. Cir. 2017).

II.

On appeal, the first question is whether the district court erred by granting the Foreign Officials' motion to dismiss the complaint for lack of personal jurisdiction. Specifically, we must answer whether the Foreign Officials purposefully availed themselves of the United States by torturing Lewis to extract a false confession that he was an American mercenary. We think not.

¹ At the motion to dismiss stage, we can take judicial notice of facts incorporated by reference into the complaint. *See Singletary v. Howard Univ.*, 939 F.3d 287, 293 n.1 (D.C. Cir. 2019); *see also Williams v. Lew*, 819 F.3d 466, 473 (D.C. Cir. 2016) (citing *Farah v. Esquire Magazine*, 736 F.3d 528, 534 (D.C. Cir. 2013)).

5

A.

Only two types of personal jurisdiction can provide a home for Lewis's theory. The first is general jurisdiction, and "the paradigm forum for the exercise of general jurisdiction [for an individual] is the individual's domicile." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011). Because the Foreign Officials are domiciled in the DRC, general jurisdiction does not exist. Appellant's Br. 12; Compl. ¶ 8, J.A. 7.

Without general jurisdiction, Lewis must establish specific jurisdiction over the Foreign Officials. Interpreting the Fourteenth Amendment's Due Process Clause, the Supreme Court has long held that specific jurisdiction is proper when a defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The defendant's contacts must be "purposefully directed," *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (citation omitted), at the forum to establish "foreseeability . . . that the defendant's conduct and connection with the forum . . . are such that he should reasonably anticipate being haled into court there." *Id.* at 474 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)); see also *Mwani v. bin Laden*, 417 F.3d 1, 12 (D.C. Cir. 2005) (making clear that when answering whether a court has specific jurisdiction over a foreign defendant, the question is whether the foreign defendant purposefully availed himself of the forum). And a plaintiff's claims must "aris[e] out of or relat[e] to the defendant's contacts with the forum." *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1780 (2017) (alterations in

original) (emphasis removed) (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014)).

Lewis does not seek specific jurisdiction under the Fourteenth Amendment pursuant to Federal Rule of Civil Procedure 4(k)(1). That would establish personal jurisdiction over a domestic defendant in a particular state. Compl. ¶ 7, J.A. 7; Fed. R. Civ. P. 4(k)(1). Instead, Lewis asserts jurisdiction under the Fifth Amendment over a foreign defendant according to Rule 4(k)(2). Compl. ¶ 7, J.A. 7; Fed. R. Civ. P. 4(k)(2)(B) (requiring that so long as a defendant is not subject to general jurisdiction, exercising personal jurisdiction may be appropriate if “consistent with the United States Constitution and laws”). Rule 4(k)(2) permits specific jurisdiction if the defendant has, among other things, “affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party.” Fed. R. Civ. P. 4(k) advisory committee’s notes to 1993 amendments.

True, the Supreme Court has yet to explicitly consider whether the Fifth Amendment’s Due Process Clause requires the same minimum contacts to establish specific jurisdiction as under the Fourteenth Amendment. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1784 (“[W]e leave open the question whether the Fifth Amendment imposes the same restrictions [as the Fourteenth] on the exercise of personal jurisdiction by a federal court.”). However, most sister circuits and this Court agree that little jurisdictional daylight exists between the two Amendments. *Livnat*, 851 F.3d at 54–55.² We have made clear

² See also e.g., *Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226, 235 (5th Cir. 2022) (en banc) (“We . . . hold that the Fifth Amendment due process test for personal jurisdiction requires the same ‘minimum contacts’ with the United States as the Fourteenth Amendment requires with a state.”); *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 330 (2nd Cir. 2016) (“This Court’s

precedents clearly establish the congruence of due process analysis under both the Fourteenth and Fifth Amendments.”); *Xilinx, Inc. v. Papst Licensing GmbH & Co. KG*, 848 F.3d 1346, 1352–53, 1353 n.2 (Fed. Cir. 2017) (“[W]e have applied the Supreme Court’s jurisprudence of personal jurisdiction regarding the demands of the Fourteenth Amendment’s Due Process Clause to [the Fifth Amendment].”); *Trs. of the Plumbers & Pipefitters Nat’l Pension Fund v. Plumbing Servs., Inc.*, 791 F.3d 436, 443–44 (4th Cir. 2015) (holding that absent a federal statute requiring nationwide service of process, the “‘minimum contacts’ standard . . . [applies] when assessing whether personal jurisdiction is consistent with the Due Process Clause of the Fourteenth Amendment”); *KM Enters., Inc. v. Glob. Traffic Techs.*, 725 F.3d 718, 731 (7th Cir. 2013) (holding that when a federal statute provides for nationwide service of process, “due process requires only that [a defendant] have sufficient minimum contacts with the United States as a whole to support personal jurisdiction”); *Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1180 (9th Cir. 2004) (citation omitted) (“In a statute providing for nationwide service of process, the inquiry to determine ‘minimum contacts’ is thus ‘whether the defendant has acted within any district of the United States or sufficiently caused foreseeable consequences in this country.’”); *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 369 (3d Cir. 2002) (“[We] hold that a federal court’s personal jurisdiction may be assessed on the basis of the defendant’s national contacts when the plaintiff’s claim rests on a federal statute authorizing nationwide service of process.”); *Med. Mut. of Ohio v. deSoto*, 245 F.3d 561, 567–68 (6th Cir. 2001) (“[W]hen a federal court exercises jurisdiction pursuant to a national service of process provision, it is exercising jurisdiction for the territory of the United States and the individual liberty concern is whether the individual over which the court is exercising jurisdiction has sufficient minimum contacts with the United States.”); *United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 618 (1st Cir. 2001) (“Whereas state long-arm statutes require a showing that the parties have sufficient contacts with the forum state, Rule 4(k)(2) requires a showing that the parties have sufficient contacts with the United States as a whole.”); *Republic of Panama v. BCCI Holdings*

even recently that “[a]part from the scope of the forum and potential federalism considerations, the Fifth and Fourteenth Amendment Due Process inquiries are generally analogous.” *Atchley v. AstraZeneca UK Ltd.*, 22 F.4th 204, 232 (D.C. Cir. 2022). Exceptions occur when the Fifth Amendment does not cover a particular entity, such as States of the Union or sovereign foreign states, not when foreign persons are involved. *South Carolina v. Katzenbach*, 383 U.S. 301, 323–324 (1966); *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (D.C. Cir. 2002).

With respect to foreign defendants, a plaintiff’s complaint must “make a *prima facie* showing of the pertinent jurisdictional facts.” *Livnat*, 851 F.3d at 56–57 (citation omitted); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (holding that a complaint’s allegations should “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face’”). Resolving factual disputes in favor of the plaintiff, such jurisdictional facts are plausible if they allow a “court to draw the reasonable inference that the defendant” intended to target the United States. *See Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). The Fifth Amendment’s Due Process Clause requires “meaningful ‘contacts, ties, or relations[.]’” with the United States to create a “‘fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign.’” *Mwani*, 417 F.3d at 11 (second alteration in original) (quoting *Burger King Corp.*, 471 U.S. at 472). But if a plaintiff’s assertions are mere “[c]onclusory statements” or a “bare allegation of conspiracy

(*Luxembourg*) S.A., 119 F.3d 935, 946–47 (11th Cir. 1997) (“A court must . . . examine a defendant’s aggregate contacts with the nation as a whole rather than his contacts with the forum state in conducting the Fifth Amendment analysis.”).

or agency” such that they “merely state the plaintiff[’s] theory of specific jurisdiction[,]” then exercising specific jurisdiction is improper. *Livnat*, 851 F.3d at 57 (quoting *First Chi. Int’l v. United Exch. Co.*, 836 F.2d 1375, 1378–79 (D.C. Cir. 1988)).

This Court’s precedents foreclose Lewis’s jurisdictional theory that the Foreign Officials tortured him because they believed he was an American mercenary. To start, torture alone of an American abroad is “insufficient to satisfy the usual ‘minimum contacts’ requirement.” *Price*, 294 F.3d at 95. Lewis argues that *Price* is distinguishable because only its dicta are relevant to this case. Not so.

Price is an analogous situation. There, the petitioners were two American citizens who alleged torture and detainment in Libya. After the Americans photographed sites around a city in Libya, Libyan officials arrested them because the officials “believed that the[] photographs constituted anti-revolutionary propaganda.” *Id.* at 86. The officials then imprisoned them for 105 days, where they were subject to various forms of physical and mental abuse. *Id.* The petitioners, too, claimed that their detention targeted the United States. *See id.* at 86, 95. However, this Court made clear that even if Libya was a “person” capable of jurisdictional reach under the Fifth Amendment, “torture[] [of] two American citizens in Libya . . . would be insufficient to satisfy the usual ‘minimum contacts’ requirement.” *Id.* at 95.

Still, Lewis believes that the Foreign Officials’ “propaganda campaign” to frame him as an American mercenary sufficiently targeted the United States. Appellant’s Br. 14. For support, he asks this Court to narrow *Mwani*’s holding to require only that a foreign defendant “engage[] in unabashedly malignant actions directed at [and] felt in” the

United States. *Mwani*, 417 F.3d at 4 (second alteration in original) (quoting *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1349 (D.C. Cir. 2000)); Appellant’s Br. 15. That reading divorces this Court’s interpretation of the minimum contacts necessary to satisfy such a standard. *Mwani*, 417 F.3d at 13.

In *Mwani*, the contacts directed at the United States by Osama bin Laden and al Qaeda were substantial: petitioners pointed to at least three separate terrorist attacks orchestrated by the defendants—the 1993 World Trade Center bombing in New York; the 1998 plot to bomb the United Nations Federal Plaza and the Lincoln and Holland Tunnels in New York; and the 1998 bombing of the American Embassy in Nairobi. *Id.* The reason those contacts aimed at the United States were evident of “unabashedly malignant actions” was because the Nairobi attack (i) was orchestrated to “kill both American and Kenyan employees . . .”; (ii) it was designed to “cause pain and sow terror in the embassy’s home country, the United States”; and (iii) in light of the two prior attacks, the Nairobi attack was part of “an ongoing conspiracy to attack the United States” *Id.*

None of *Mwani*’s forum-directed activity occurred here. The only ongoing conspiracy Lewis submits has everything to do with the DRC’s politics rather than the United States. Official Tambwe claimed 600 United States citizens entered the DRC to destabilize it since October 2015 and then ordered an investigation into whether the American and South African citizens, who were currently working for the opposition presidential candidate, were mercenaries. Compl. ¶¶ 32–33, 35, J.A. 11–12. Accordingly, the fact that Lewis is an American was incidental to the Foreign Officials’ chief concern: that mercenaries—whether American or South African—were attempting to influence the DRC’s presidential

elections. *See Mwani*, 417 F.3d at 13 (noting that a plaintiff’s nationality does not necessarily defeat specific jurisdiction); *see also Twombly*, 550 U.S. at 567 (noting that courts should note a complaint’s “obvious alternative explanation”).

The Foreign Officials cannot be haled into an American court just because Lewis concludes that their motivation was against the United States. Specifically, Lewis argues, “other Americans have been singled out by [the Foreign Officials] for persecution . . . because they are Americans and, in the case of veterans[,] such as Mr. Lewis, because they are veterans.” Compl. ¶ 39, J.A. 12–13. Yet, he offers no further allegation to explain these past occurrences in detail, like whether the Foreign Officials specifically targeted the United States in the past. In *Livnat*, this Court rejected the petitioner’s conclusory allegation that the Palestinian Authority had a “general practice of using terrorism to influence United States public opinion and policy” *Livnat*, 851 F.3d at 57 (citation and internal quotation marks omitted). So, here, too, Lewis “merely stat[ing] [his] theory of specific jurisdiction” is not enough to transform the theory into a grant of personal jurisdiction over the Foreign Officials. *Id.*

Lewis’s final support for his jurisdictional theory is that the Foreign Officials’ actions against him attempted to entangle the United States in a geopolitical conflict. Oral Arg. Tr. 9:6–18. Attempting to distinguish *Livnat*, Lewis argues that petitioners there consequentially failed to describe how the attack at Joseph’s Tomb was part of the Palestinian Authority’s plot to influence United States policy. Appellant’s Br. 21; *Livnat*, 851 F.3d at 57. But Lewis’s theory is even more wanting: that two lone DRC Officials, in their individual capacities, intended to entangle the United States in a geopolitical conflict over their own national election. Compl. ¶¶ 4–5, J.A. 6. At least in *Livnat*, the relationship between the Palestinian Authority,

Israel, and their governmental organizations was uniquely “[e]stablished following the 1993 Oslo Accords.” *Livnat*, 851 F.3d at 47. Here, however, without any other supposed relationship between the Foreign Officials and the United States, it is not plausible that the Foreign Officials meant to avail themselves of the United States by merely accusing American citizens of being mercenaries.

The specific articles referenced in Lewis’s complaint embroil his entanglement theory. Lewis argues that at least two of the articles incorporated by reference in his complaint suggest that “the United States was putting a lot of political pressure on the Kabila regime to hold a free and fair election.” Oral Arg. Tr. 9:6–12. Because of the DRC’s resistance to doing so, the Foreign Officials, says Lewis, attempted to influence the United States’ foreign policy. *See* Oral Ag. Tr. 9:11–18. But the highlighted articles contradict Lewis’s proposition. Indeed, one article expresses, “It has become clear to many that Lewis has been entangled in a brutal struggle for power *inside* the DRC”; Margaret Brennan, *CBS Exclusive: Family of American Security Contractor Jailed in Congo Pleads for His Freedom*, CBS News (May 19, 2016), <https://www.cbsnews.com/news/cbs-exclusive-family-of-american-security-contractor-jailed-in-congo-pleads-for-his-freedom> (emphasis added) (last visited Jan. 2023). While that article does reference then-President Obama’s efforts to support a free and fair election in the DRC, it is not plausible that the President’s effort “ar[ose] out of or relat[ed] to the [Foreign Officials’] contacts with the forum.” *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1780 (citation and internal quotation marks omitted). Moreover, although the second article generally recounts Lewis’s detention, it does so concluding that the DRC’s then-President “[was generally] resisting international calls and rising pressure in Congo to relinquish power by the end of th[e] year, as Congo’s Constitution

requires.” Jeffrey Gettleman, *Congo Lurches Toward a New Crisis as Leader Tries to Crush a Rival*, New York Times (May 11, 2016), <https://www.nytimes.com/2016/05/12/world/africa/congo-moise-katumbi-joseph-kabila.html> (last visited Jan. 2023). Because neither article even implies that the Foreign Officials directed their efforts specifically at the United States, we cannot “reasonabl[y] infer[]” that the articles suggest purposeful availment of the United States. *Iqbal*, 556 U.S. at 678 (citation omitted).

The United States Embassy’s public denial of Official Tambwe’s allegation is equally unhelpful in establishing specific jurisdiction. Lewis maintains that the Embassy’s public denial, and its nonpublic diplomatic efforts regarding his detention and torture, confirm that the Foreign Officials intended to target the United States. Oral Arg. Tr. 11:1–18; 12:8–20; Appellant’s Br. 5–7. The Embassy’s public statement does not support such a theory. It does not suggest that the Foreign Officials attempted to “cause pain and sow terror” in the United States. *Mwani*, 417 F.3d at 13. It does not infer that the Officials’ allegations were part of some conspiracy against the United States. *Id.* Instead, the Embassy merely disputed the Foreign Officials’ allegations, stating, “We are aware of the detention . . . of an American citizen . . . [] Lewis was not armed and allegations he was involved in mercenary activity are false.” *U.S. Embassy Concerned About Reported False Accusations of Mercenary Activities*, U.S. Embassy in the Democratic Republic of the Congo (May 5, 2016), <https://cd.usembassy.gov/u-s-embassy-concerned-reported-false-accusations-mercenary-activities/> (last visited Jan. 2023). Without more, we cannot infer that the Embassy’s cursory denunciation is jurisdictionally consequential.

Traditional notions of fair play and substantial justice do not save Lewis's complaint. Torture is central to proving a TVPA claim. Pub. L. No. 102-256, § 3(b), 106 Stat. 73 (1992) (codified at note following 28 U.S.C. § 1350). Lewis no doubt makes troubling allegations of the torture he experienced. However, his chief argument for why justice warrants personal jurisdiction here depends solely on the TVPA. And "it is well-settled that 'a statute cannot grant personal jurisdiction where the Constitution forbids it.'" *Price*, 294 F.3d at 95 (citation omitted).

B.

Without personal jurisdiction, Lewis claims that the district court should have permitted jurisdictional discovery. A district court acts well within its discretion to deny discovery when no "facts additional discovery could produce . . . would affect [the] jurisdictional analysis." *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143, 1147 (D.C. Cir. 1994). A plaintiff need only have a "good faith belief" that "reasonable discovery" could "supplement . . . jurisdictional allegations" *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1090 (D.C. Cir. 1998) ("good faith belief"); *Second Amend. Found. v. U.S. Conf. of Mayors*, 274 F.3d 521, 525 (D.C. Cir. 2001) (citation omitted) ("reasonable discovery"); *GTE New Media Servs. Inc.*, 199 F.3d at 1351 ("supplement . . . jurisdictional allegations"); *see also Urquhart-Bradley v. Mobley*, 964 F.3d 36, 48 (D.C. Cir. 2020) (citation and internal quotation marks omitted) ("[I]f a party demonstrates that it can supplement its jurisdictional allegations through discovery, then jurisdictional discovery is justified."). But the discovery request cannot be a "fishing expedition." *Bastin v. Fed. Nat'l Mortg. Ass'n.*, 104 F.3d 1392, 1396 (D.C. Cir. 1997).

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Some confusion exists about Lewis's precise justification for jurisdictional discovery. In his appellate brief, he requested jurisdictional discovery "to obtain additional evidence demonstrating [the Foreign Officials'] intended effect on the United States, evidence that goes beyond the showing of torture itself." Appellant's Br. 26. His reply brief strengthened his ask, seeking "emails and other correspondence concerning the allegations in the complaint, and depositions of the [Foreign Officials]." Reply Br. 14–15.

Regardless, the district court did not abuse its discretion when it denied jurisdictional discovery. Each argument that Lewis submits on appeal does not "cure [his] failure to tie [his] jurisdictional theory to [his] attack" *Livnat*, 851 F.3d at 58. Indeed, the district court denied Lewis's jurisdictional discovery request because he failed to describe "specific ways to supplement his allegations." J.A. 27. Requesting relevant correspondence from the Foreign Officials is likely to be a fishing expedition because it is unlikely to uncover that they were part of any scheme to target the United States. Nevertheless, because Lewis failed to make any specific discovery requests until his reply brief, that argument is waived on appeal. *New York Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) ("[I]n order to prevent the 'sandbagging' of another party, 'we have generally held that issues not raised until the reply brief are waived.'" (citation omitted)).

III.

Lewis failed to demonstrate that exercising specific jurisdiction over the Foreign Officials, in this case, would meet the requirements of the Fifth Amendment's Due Process Clause. And he also failed to describe particular ways in which jurisdictional discovery would cure his complaint's defect.

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Therefore, we affirm the district court's grant of the Foreign Officials' motion to dismiss for lack of personal jurisdiction and its denial of Lewis's request for jurisdictional discovery.

So ordered.